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6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
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8 AUDREY PATTERSON,)
9 Plaintiff,) No. CV-05-400-CI
10 v.) ORDER DENYING DEFENDANT'S
11 JO ANNE B. BARNHART,) MOTION TO DISMISS AND
Commissioner of Social) DIRECTING PARTIES TO FILE
12 Security,) PROPOSED STIPULATED SCHEDULING
13 Defendant.) ORDER
14

15 BEFORE THE COURT is Defendant's Motion to Dismiss as untimely.
16 (Ct. Rec. 4.) Attorney Kenneth Isserlis represents Plaintiff;
17 Special Assistant Attorney General Stephanie R. Martz represents
18 Defendant. The parties have consented to proceed before a
19 magistrate judge. (Ct. Rec. 3.)

20 The only issue is whether Plaintiff timely commenced her
21 federal action following the Appeals Council's denial of review. By
22 letter dated September 20, 2005, the Appeals Council gave notice to
23 Plaintiff and her counsel of record of its decision to deny review
24 and the 60-day limit for commencing an action in federal court.
25 (Ex. 2.) That notice was mailed to Plaintiff at 9812 E. Maringo
26 Drive, Spokane, WA 99206. There is no dispute the Appeals Council
27 granted an extension of time (30 days) to file a civil action dated
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1 November 4, 2005, pursuant to 20 C.F.R. § 422.210.¹ (Ct. Rec. 6, Ex.
2 3.) That notice also provided: "We assume that you received this
3 letter 5 days after the date on it unless you show us that you did
4 not receive it within the 5-day period." There is no proffer from
5 Defendant as to the date the notice was actually mailed, although
6 pursuant to regulation "[M]ailing' is construed as the date of
7 receipt of the notice, which is presumed to occur five days after
8 the date of the notice." 20 C.F.R. § 422.210(c)). Defendant's
9 Declaration, signed January 2006, states only "the undersigned is
10 aware of a request for an extension of time." (Ct. Rec. 6, Devera
11 Decl. at ¶(3)(b).)

12 The instant civil action was filed on December 13, 2005 (Ct.
13 Rec. 1), outside the 30-day limit unless a showing is made the
14 extension notice was received by Plaintiff or her attorney beyond
15 the five-day period. A Declaration by attorney Harvey Grad (Ct.
16 Rec. 7, Grad Decl.) avers the Appeals Council letter was not
17 received in his office until Monday, November 14, 2005, as noted by
18 the date stamp on the letter. (Ct. Rec. 7, Ex. 1.) Plaintiff avers
19 she did not receive correspondence from the Appeals Council, due
20 possibly to an incorrect zip code (99206) used by the Appeals
21 Council in the Patterson address. (Ct. Rec. 7, Patterson Decl.)
22 Additionally, Plaintiff avers she complained to the United States
23 Post Office, Complaints OR 25227808 and OR 25389334, of misdirected
24 and missing mail to their residence during the November - December
25 2005 time period. If the court accepts this explanation, the

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27 ¹There is no dispute the Appeals Council may extend the filing
28 time on a showing of good cause. 20 C.F.R. § 404.968(b).

1 instant action was timely filed within 30 days of receipt (November
2 14, 2005) by Plaintiff's counsel of the November 4, 2005,
3 correspondence from the Appeals Council.

4 The 60-day filing period (plus extensions) is not
5 jurisdictional. *Vernon v. Heckler*, 811 F.2d 1274, 1279 (9th Cir.
6 1987). Notice received by either the individual or the individual's
7 attorney, whichever occurs first, triggers the sixty-day limitations
8 period. *Bess v. Barnhart*, 337 F.3d 988, 990 (8th Cir. 2003). The
9 notice itself includes language regarding only a presumption of
10 receipt within five days. Courts have differed on the question
11 whether affidavits from the claimant and/or his or her
12 representative attesting to receipt beyond the five days are
13 sufficient to overcome the presumption. Compare *Kinash v. Callahan*,
14 129 F.3d 736, 738 (5th Cir. 1997) (claimant's sworn word he did not
15 receive notice insufficient to rebut presumption); *Roberts v.*
16 *Shalala*, 848 F.Supp. 1008, 1015-17 (M.D. Ga. 1994) (affidavit of
17 attorney's receptionist insufficient); *Leslie v. Bowen*, 695 F.Supp.
18 504, 506 (D. Kan. 1988) (claimant's affidavit insufficient); *Solberg*
19 *v. Secretary of Dep't of Health & Human Servs.*, 583 F.Supp. 1095,
20 1098 (E.D. Wis. 1984) (statements of claimant and father
21 insufficient); *Rouse v. Harris*, 482 F.Supp. 766, 768-69 (D. N.J.
22 1980) (plaintiff's assertion insufficient), with *Bartolomie v.*
23 *Heckler*, 597 F.Supp. 1113, 1116 (N.D.N.Y. 1984) (fact lawyer did not
24 receive notice sufficient to rebut presumption).

25 Here, attorney Grad has made a sufficient showing in light of
26 the mail delivery practice to his office building and the date
27 received stamp that the notice was received in his office on
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1 November 14, 2005.² Judicial review was commenced within 30 days of
2 that date. *Matsibekker v. Heckler*, 738 F.2d 79, 81 (2nd Cir. 1984).
3 Having concluded judicial review was timely filed, there is no need
4 to address equitable tolling. Accordingly, Defendant's Motion to
5 Dismiss (Ct. Rec. 4) is **DENIED**.

6 **Within 20 business days, the parties are directed to submit a**
7 **stipulated proposed scheduling order to the court.**

8 **IT IS SO ORDERED.** The District Court Executive is directed to
9 file this Order and provide a copy to counsel for Plaintiff and
10 Defendant.

11 DATED February 9, 2006.

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13 S/ CYNTHIA IMBROGNO
14 UNITED STATES MAGISTRATE JUDGE
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25 ²Assuming there was no mail delivery on Saturday to claimant's
26 representative's office and that day is not counted as one of the
27 five days, five days from the date of the notice would have been
28 November 14, because of the November 11 holiday.